Filed 11/28/16 P. v. Randall CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LEE RANDALL, JR.,

Defendant and Appellant.

F069698

(Fresno Super. Ct. Nos. F09905368 & F14901907)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Charles M. Bonneau III, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant James Lee Randall, Jr., was charged and convicted of count I, possession of methamphetamine for sale (Health & Saf. Code, § 11378); and count II, misdemeanor giving false information to a police officer (Pen. Code, § 148.9, subd. (a)),[1] with one prior strike conviction. He was searched and found in possession of the narcotics when officers arrived at his apartment to serve an arrest warrant. Defendant was sentenced to the second strike term of four years.

On appeal, defendant contends the court committed prejudicial error when it denied his motion to stipulate to the lawfulness of his detention and search to satisfy certain elements of count II, and instead allowed the prosecution to introduce evidence that the police served an "arrest" warrant on him, and an officer recognized defendant from a prior "booking" photograph.

Defendant also contends the court erroneously allowed the prosecution's expert to testify to the ultimate factual issue in the case, that he possessed the methamphetamine for purposes of sale; the prosecutor committed prejudicial misconduct in closing argument when he asserted facts not in evidence, that the defense witnesses used methamphetamine; and the court improperly sustained the People's objection to defense counsel's closing argument, which purportedly prevented him from presenting a defense.

We will affirm.

FACTS

On the afternoon of February 3, 2014, Officer Donovan Pope and other uniformed officers went to an apartment complex on Fresno and F Streets to serve an arrest warrant on defendant.[2] Pope and the officers went to apartment No. 20. Pope testified they did

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] In issue I, *post*, we will address defendant's contention that the court erroneously denied his request to stipulate to the lawfulness of the detention and arrest as elements of count II, and instead allowed the prosecution to introduce evidence that the officers were serving an "arrest" warrant on him.

not know if that was defendant's last known address but understood that he might be there. Other officers had gone to that apartment earlier in the day to take defendant "into custody," but defendant was not there.

Officer Pope approached the door of apartment No. 20 and heard loud music inside the apartment. He knocked and announced the officers' presence. After one or two minutes, the music was turned off, but no one answered the door. The officers continued to knock, identified themselves in louder voices, called out defendant's name, said they knew he was inside, and directed him to open the door. There was still no response.

The officers asked the apartment manager, Angel Smith (Angel), who lived in that apartment. Angel said that defendant lived there. They asked if she could let them into defendant's apartment, but she said she did not have a key.

A neighbor approached the officers and offered to help them get into defendant's apartment. The neighbor showed the officers how they could climb through a window in the neighbor's apartment, and then walk along an exterior landing to get to defendant's window.

Officer Pope went into the neighbor's apartment, climbed through the window, walked along the landing, and approached the window of defendant's apartment. Defendant's window was open. There was a black sheet or curtain hanging in front of the open window.

Officer Pope pulled aside the window covering. He looked through the open window and saw a man lying on the bed, about four to five feet away. He was fully clothed, wearing a hat, and on top of the covers. He had a headphone in one ear and his eyes were closed. Pope believed the man was pretending to be asleep.

Officer Pope testified he recognized the man as defendant. Pope had previously looked at "[a] prior booking photo" of defendant.[3] Pope was not positive about the man's identification because "he was kind of trying to turn away from me. But it did appear to be him …."

Officer Pope loudly announced that he was a police officer and said, " 'James, we know it's you, wake up.' " Defendant did not respond. Pope repeated his command several times and defendant did not respond. Pope told defendant that he would use pepper spray if defendant did not answer. Defendant still failed to respond.

Officer Pope discharged pepper spray through the window and aimed it at the wall near defendant's feet. Defendant opened his eyes, sat up, and began to argue with Pope. Defendant still failed to look at him. Pope ordered defendant to get up and open the front door because the officers were outside. Defendant failed to do so.

Officer Pope testified he spent several minutes trying to reason with defendant, but defendant refused to comply with his instructions. He asked defendant for his name. Defendant initially did not respond. Defendant then said he was "Herman Jackson." Pope told defendant he knew defendant was lying, and Pope knew his real name. Defendant said he was Herman Jackson three or four times.

At one point, defendant pulled out a cellphone and appeared to make a call. Defendant shoved the cellphone under his pillow. He removed a key from his pocket and also placed it under his pillow.

A second officer used the neighbor's window and the landing to join Officer Pope. Pope and the second officer entered defendant's apartment through the window and detained him as he remained on the bed.

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[3] In issue I, *post*, we will also address defendant's related contention that the court erroneously allowed Officer Pope to testify that he had looked at a "booking" photograph of him.

Search of defendant and the apartment

Defendant was taken into custody. Officer Pope confirmed defendant's identity through unique tattoos. Defendant was taken into custody for the warrant and searched. He did not appear to be under the influence. He was wearing a black coat and blue jeans.

Officer Pope described the small apartment as "cluttered." There were documents in defendant's name in the apartment. The key that defendant had placed under his pillow opened the apartment door.

The officers retrieved the cellphone which defendant had placed under the pillow.

There was a plastic bag in the pocket of defendant's pants, which contained a small rock of crystal methamphetamine. The rock itself weighed approximately 0.108 grams and had a street value of about $10. The same pocket contained another cellphone. Defendant had two more cellphones in his back pocket.

A large amount of cash was in the pocket of defendant's pants. A pouch was hanging from a lanyard around his neck. This pouch contained another large amount of cash. Defendant had a total of $1,041, mostly in small bills.

A small refrigerator was at the foot of the bed. A piece of cardboard was affixed to the side of the refrigerator with a magnet. There were several names and different numbers written next to each name, consistent with a pay/owe sheet.

Search of the jacket

Officer Pope testified that as the officers searched the apartment, he saw a jacket hanging on a hook "just inside the front door." Pope searched the jacket and "in the left pocket of that jacket there was a silver cylindrical container, screw-top container, and inside that was a larger amount of crystal methamphetamine." There was nothing remarkable or unusual about the jacket, and it appeared that it would fit defendant.

The methamphetamine weighed approximately 4.357 grams. The street value of 4.3 grams was about $430.

Items booked into evidence

Officer Pope testified he seized and booked into evidence the cash, the drugs, the cylindrical container that contained the larger amount of methamphetamine, the pay/owe sheet and the magnet used to post it on the refrigerator, and the four cellphones. The prosecution introduced photographs of these items. Pope did not obtain a search warrant for the cellphones and did not examine their contents.

Officer Pope did not testify whether he seized the jacket or booked it into evidence. The prosecution did not introduce any photographs of the jacket.[4]

Officer Pope did not find pipes, syringes, or any evidence that someone had been using drugs in the apartment. He did not find scales, plastic bags, or packaging materials.

People arriving at defendant's apartment

The officers closed the apartment's exterior door as they searched defendant and the interior. The searches took about 30 minutes. While they conducted the searches, three people arrived at the apartment at different times and knocked on the door. In response to each knock, the officers opened the door, and each person appeared surprised to see the police were there. Two people asked for "James," and the third person referred to defendant as some kind of relative. None of these people offered a reason why they were there except to see "James."

Officer Pope's opinion testimony

The prosecutor showed Officer Pope the photograph of the materials found during the search, asked him to assume that one person possessed these items, and asked if he had an opinion why a person would possess those items.

Officer Pope testified that in his opinion, the methamphetamine was possessed for purposes of street-level sales, based on the large amount of methamphetamine, which was

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[4] As we will discuss in issue III, *post*, defense counsel asserted in closing argument that the police seized and removed this jacket from the apartment. The court sustained the prosecutor's objection to facts not in evidence.

more than any personal user would consume in a reasonable length of time; the four cellphones, which are often used by drug dealers to keep drug contacts separate from personal contacts; the large amount of cash in small bills, consistent with sales of small amounts of drugs; the pay/owe sheet, to keep track of drug transactions; and the three people who happened to appear at the apartment without any explanation.

DEFENSE

Defendant did not testify. He called several witnesses who lived in the same apartment building.

Angel Smith was the manager of defendant's apartment complex. Smith testified that the building was in a "very bad area" and had frequent police activity. She testified that defendant did not generally have heavy traffic to his residence, and that defendant's father was the night security guard.

Keith Thompson (Thompson) was the assistant manager of the apartment building. Thompson also testified he did not observe frequent traffic in and out of defendant's residence. Thompson said that defendant had exchanged refrigerators with another tenant, and Thompson believed the other man was a drug dealer.[5]

Temmeca Dykes, another resident of the apartment complex, testified she owned the four cellphones that were found with defendant. She obtained the four cellphones from homeless people in the neighborhood, in exchange for food, clothes, or a "joint." Dykes said she gave the cellphones to defendant because he was going to put his music playlist on them for her.

Evidence about packing defendant's property

Patty Kennett (Kennett) and Pamela Rummerfield (Rummerfield) testified they lived in the same apartment complex and defendant was their friend. After defendant was arrested, Kennett and Rummerfield went into defendant's apartment and packed his

[5] Defendant introduced Thompson's testimony to address the prosecution's evidence about the pay/owe sheet affixed to the door of the refrigerator.

belongings, including this clothes, so nothing would be stolen. They stored all the boxes in their apartment.

Rummerfield testified that as she packed defendant's possessions, she found defendant's blue jacket hanging in the closet and placed it in one of the boxes.

Kennett testified that after they packed and moved defendant's belongings, a man arrived and asked her if she had "a certain jacket" and she said no. Kennett did not know the man's name and he did not describe the jacket.

Rummerfield also testified about the man who asked for the jacket:

> "Somebody came over – well, actually, he asked Patty [Kennett]. He had asked Patty when she was going back to the room and I told her that – that she needed to talk to [defendant's] dad before she gave anybody anything, but there was never – there was only his jacket in there. There was never another – another jacket in there except for his blue jacket. When we cleaned it – when she cleaned out the room, that was the only jacket in there was his blue jacket. There was not another one in there. *And that's what we told the guy two days later, I think it was, when he came by the house and asked if we had found his jacket*. And I told him that only [defendant's] jacket was there." (Italics added.)

Rummerfield testified the man "said it was a blue jacket. We showed him [defendant's] jacket and *it wasn't the same jacket. He was mad*." (Italics added.) Rummerfield testified defendant had been "very proud of that jacket" and she knew it was not the stranger's jacket.[6]

DISCUSSION

I. Defendant's Proposed Stipulation

Defendant was charged and convicted in count II with a violation of section 148.9, subdivision (a), which states:

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[6] As we will discuss in issue III, *post*, defense counsel attempted to argue that Officer Pope seized the jacket which contained the large amount of methamphetamine, defendant's friends packed a second jacket, and the stranger was upset because he was looking for the first jacket. The court sustained the prosecutor's objection to this argument because there was no evidence the police seized the jacket that contained the methamphetamine.

> "Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer … *upon a lawful detention or arrest* of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor." (Italics added)

Defendant contends the court abused its discretion when it declined his motion to stipulate that he was lawfully detained and searched, which would have satisfied the prosecution's burden of proof for these elements for count II, and instead allowed the prosecution to introduce evidence that Officer Pope went to the apartment to serve an "arrest" warrant on defendant. Defendant also asserts the court committed a related evidentiary error when it overruled his objection to Pope's testimony that he had looked at defendant's prior "booking" photograph.

Defendant argues these evidentiary errors were prejudicial because the jury heard propensity evidence that was not relevant for any purpose.

The People respond that the court did not abuse its discretion because the prosecution could not be forced to accept a stipulation, and the evidence was not prejudicial.

A. Defendant's Offer to Stipulate

Prior to jury selection, the court asked the parties how they were going to address the officers' entry and search of defendant's apartment. The prosecutor explained the officers went to defendant's apartment because of a Crime Stoppers tip about narcotics sales. The prosecutor said defendant also had an outstanding arrest warrant, and the officers should be able to testify about why they were at his apartment.

The court replied that references to a tip about narcotics sales would be prejudicial because it would not have given the officers the lawful right to enter, detain, or arrest. The court asked the parties to consider a stipulation unless defendant conceded the entry and search were lawful.

After jury selection, the court returned to this issue. The court noted that count II, giving false information to an officer, required proof that the defendant was lawfully

detained or arrested, and falsely represented or identified himself as another person: "What is at issue is whether the officer basically had a legal right to ask for his name."

The court believed the existence of defendant's outstanding arrest warrant was a relevant element of count II. The court proposed that the officer testify that there was an arrest warrant without mentioning the reason for the warrant, the narcotics tip, or the probation violation.

Defense counsel asked whether the officer could just say he had a "warrant" instead of saying it was an "arrest warrant." The court said the officer could testify that he had an arrest warrant because the People had the burden of proving that Officer Pope was lawfully performing his duties as an element of count II, and an officer was not lawfully performing his duties if he unlawfully arrested or detained someone. The court added that "if the officer testifies that he had an arrest warrant … then that should be sufficient, if believed by the jury, to satisfy that element."

Defense counsel moved for the court to accept a stipulation that defendant was subject to a lawful arrest and search, as relevant to the elements of count II. The court said a stipulation required an agreement between both parties. The court asked the prosecutor for comment. The prosecutor refused to accept the stipulation because he wanted to introduce evidence to explain the reasons for the officer's actions that day.

Defense counsel again argued that reference to an "arrest warrant" was unduly prejudicial pursuant to Evidence Code section 352, and the evidence should be limited to the existence of a "warrant."

The court overruled the objection, and said Officer Pope could testify that he received a tip that defendant was at that location, and he had an arrest warrant. The court found it was the "least onerous alternative of the options that are available to the Court to instruct on that element" for count II.

The prosecutor asked the court whether Officer Pope could testify that he identified defendant because he had looked at his "booking" photograph. Defense

counsel objected to any mention of a "booking" photograph, and argued the officer should only testify that he looked at defendant's photograph. The court overruled defendant's objection and said it "didn't really think it matters."

B. Trial Testimony and Argument

As set forth above, Officer Pope testified he and the officers went to the apartment to serve an arrest warrant on defendant because he understood defendant might be there. Pope testified that other officers went to the same apartment earlier that day for "the same thing." The prosecutor asked Pope to clarify whether the other officers took defendant "into custody." Pope explained defendant was not there.

Officer Pope also testified that when he looked through the apartment window, he recognized defendant because he had previously looked at "[a] prior booking photo" of him. Pope testified defendant was taken into custody on the warrant and searched.

After Officer Pope testified, the prosecutor asked the court to reconsider its initial ruling to exclude evidence about the Crime Stoppers tip. The prosecutor said that on cross-examination, defense counsel asked Officer Pope whether he knew that defendant was at the apartment when they went there that day. The prosecutor argued that question opened the door to introducing evidence about the Crime Stoppers tip that defendant was selling drugs from the apartment. The court denied the prosecutor's renewed motion to introduce any evidence about the Crime Stoppers tip.

In closing argument, the prosecutor reviewed the evidence and stated that Officer Pope went to the apartment to serve the arrest warrant because he had a tip defendant was there. The prosecutor also stated that Pope knew defendant gave a false name because he recognized defendant from the prior booking photograph.

Defense counsel argued that if the jury believed defendant gave a false name, then he was guilty of count II. However, counsel argued there was no motive for defendant to lie about his identity and, even if he did, the jury could not rely on that as evidence in support of count I, possession of methamphetamine for sale.

The jury was properly instructed on the elements of count II, giving false information to an officer.

The court did not give, and defendant did not ask for, any limiting instructions regarding the evidence about the arrest warrant and booking photograph.

C. Stipulations

Defendant argues the court abused its discretion when it denied his request to stipulate to the lawfulness of the detention and search as elements of count II. The People reply that the court's ruling was correct because the defense cannot use a stipulation to prevent the prosecution from proving the elements of the charged offense.

A defendant's plea of not guilty "puts in issue all the elements of the charged offense. [Citations.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 204.) "[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not *to contest* an essential element of the offense." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69–70, italics added; *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 (*Ewoldt*).)

"The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. [Citations.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007 (*Edelbacher*); *People v. Waidla* (2000) 22 Cal.4th 690, 723, fn. 5.) Conventional evidence, in contrast to a stipulation, "tells a colorful story with descriptive richness.... This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them." (*Old Chief v. United States* (1997) 519 U.S. 172, 187–188.) "There is a strong policy against depriving the People's case of its persuasiveness and strength by forcing the prosecutor to accept stipulations that soften the impact of the evidence in its entirety. [Citation.] Thus, prosecutors are not required to stipulate to the existence of any elements of the crime they are trying to prove *where the stipulation will impair the effectiveness of their case and foreclose their*

options to obtain convictions under differing theories. [Citation.]" (*People v. Cajina* (2005) 127 Cal.App.4th 929, 933, italics added; *People v. Rogers* (2013) 57 Cal.4th 296, 329–330 (*Rogers*).)

" 'As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim' [citation], and even if it 'duplicate[s] testimony, depict[s] uncontested facts, or trigger[s] an offer to stipulate' [citation]." (*People v. Boyce* (2014) 59 Cal.4th 672, 687.) "The circumstance that the defense might have preferred that the prosecution establish a particular fact by stipulation, rather than by live testimony" or photographic evidence, "does not alter the probative value of such testimony or render it unduly prejudicial. The prosecution [is] not required to accept such a stipulation or other 'sanitized' method of presenting its case. [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1169–1170.)

A series of cases illustrates these principles. In *People v. Garceau* (1993) 6 Cal.4th 140 (*Garceau*), the court held defendant's offer to stipulate to certain facts in order to prevent the admission of graphic photographs of murder victims, human tissue samples, and one victim's jawbone, was properly declined. *Garceau* cited *Edelbacher* for the general rule about stipulations, and held that even though the evidence was potentially shocking, it was relevant and probative to show the fatal wounds, and support the prosecution's theory of malice and premeditated murder. (*Id*. at pp. 180–182, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117–118.)

In *People v. Scheid* (1997) 16 Cal.4th 1 (*Scheid*), the court held that a graphic and gruesome photograph of murder victims was properly admitted even though the defendant had offered to stipulate to the fact and manner of the shooting. *Scheid* also cited *Edelbacher's* general rule, and held the photograph was relevant to clarify eyewitness testimony about the nature and circumstances of the murder, and discredit the argument that the homicides were not planned. (*Scheid*, *supra*, at pp. 14–17.) " 'The

prosecutor " 'was not obliged to prove these details solely from the testimony of live witnesses' [citation] or to accept antiseptic stipulations in lieu of photographic evidence. '[T]he jury was entitled to see how the physical details of the scene and the bod[ies] supported the prosecution theory ....' " [Citation.]' [Citations.]" (*Id*. at pp. 16–17.)

In *Rogers, supra*, 57 Cal.4th 296, the defendant was charged with first degree murder, and the prosecution sought to introduce evidence that he committed other murders in similar ways. He offered to stipulate that the charged offense was " 'a first degree or nothing type of a case' " in order to exclude evidence about similar crimes he committed in other states. (*Id*. at pp. 329–330.) *Rogers* cited to *Edelbacher* and *Scheid*, and held the trial court properly rejected the stipulation because the prosecution could not be compelled "to accept a stipulation that would deprive the state's case of evidentiary persuasiveness or forcefulness…" and " 'a criminal defendant may not stipulate or admit his way out of the full evidentiary force or the case as the Government chooses to present it.' [Citation.]" (*Rogers, supra*, at pp. 229–330.) The prosecution "had the right to present all available evidence to meet its burden of proving the requisite mens rea for first degree murder beyond a reasonable doubt. [Citations.]" (*Id*. at p. 330.)

In *People v. Thornton* (2000) 85 Cal.App.4th 44 (*Thornton*), the defendant consented to a police search of his car and a hypodermic needle was found. As he was being arrested, he told the police: " 'I have only tried [or used] heroin several times. I am not really using it.' " (*Id*. at p. 46.) The police later found a bindle of heroin in the back of the police car which had been used to transport the defendant to jail. The defendant was charged with possession of heroin. At trial, the defendant asserted the heroin did not belong to him. The trial court allowed the prosecution to introduce the defendant's statement for the limited purpose of establishing his knowledge of the nature of heroin. The jury was instructed on the limited purpose for this evidence. On appeal, the defendant asserted that his statement about using heroin constituted inadmissible character evidence. The defendant argued his defense was the drugs did not belong to

him, and the evidence was not relevant or probative because he never placed in issue whether he knew the nature of heroin. (*Id*. at pp. 46–47.)

Thornton held the court did not abuse its discretion when it admitted the defendant's statement. It declined to revert to the "outmoded notion that a criminal defendant may limit the prosecution's evidence by 'not putting things at issue' " since a defendant's guilty plea puts all elements of the charge at issue. (*Thornton, supra*, 85 Cal.App.4th at pp. 48–49.)

> "A criminal trial must always be fair. But it need not be fair in the sense of a fair fight: one in which each side has an equal chance to win. We do not handicap the parties to a criminal trial. If one side or the other has overwhelming evidence, it is allowed to use as much as it chooses, subject only to exercise of the trial court's *considerable* discretion under Evidence Code section 352. [Citation.]" (*Id*. at pp. 47–48, italics in original.)

Thornton held that defense counsel's offer – to "forego argument" that the defendant did not know the nature of heroin – did not relieve the prosecution of proving every element of the crime, including knowledge, since all elements were put in issue by the defendant's not guilty plea. (*Thornton*, *supra*, 85 Cal.App.4th at pp. 48–49.)

> "While [the defendant's] attorney indicated that 'he would not be arguing that [the defendant] did not have knowledge of [the substance's] nature as a controlled substance,' that is hardly enough to relieve the prosecution of its burden of proving such knowledge. Jurors are our peers; if we tell them – as we do – that the prosecution has to prove four things, and the prosecution subsequently proves only three, they will notice. They will notice whether the point is argued or not. *A suggestion that something will not be argued is therefore at best inadequate and at worst disingenuous. It is certainly of less weight than an offer to stipulate*." (*Id*. at p. 49, italics added.)

Thornton acknowledged *Edelbacher's* "general rule," as applied in *Scheid*, that the prosecution cannot be compelled to " ' "accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." ' [Citations.]" (*Thornton*, *supra*, 85 Cal.App.4th at p. 49.) In doing so, however, *Thornton* added a caveat:

> "We emphasize that this is a 'general rule.' *The exception – which we count on the trial courts to recognize and enforce – is the instance in which the probative value of the evidence is substantially outweighed by its prejudicial effect.* [Citation.] These are among the most difficult and important decisions a trial court makes. Even approached – as they must be – with great care, they tax every judge's reservoirs of common sense, fairness and circumspection. Given the broad discretion reposed in them, their sense of justice will often be the last word on these issues, and – obviously – much rides on their decision." (*Id*. at p. 49, italics added.)

Thornton held the court did not abuse its discretion when it admitted the "highly probative evidence" of the defendant's statement. In addition, the court properly instructed the jury on "the correct use of such evidence: *it was admissible solely on the issue of [the defendant's] knowledge of the nature of heroin, an element of the offense*." (*Thornton*, *supra*, 85 Cal.App.4th at pp. 49–50, italics added.)

D. Elements of Count II

In this case, defendant offered to stipulate to the lawfulness of the detention and search in order to exclude evidence about the "arrest" warrant. Defendant asserted that stipulation would satisfy the prosecution's burden to prove certain elements of count II, which charged him with violating section 148.9, subdivision (a), giving false information to an officer, a misdemeanor.

Section 148.9, subdivision (a) was enacted to "stop abuses under a former statute that permitted certain misdemeanants to obtain bail by posting a 10 percent deposit. Persons arrested for prostitution, for example, had been giving false identification to the police, posting 10 percent of their bail, and failing to return for their court appearances. [Citation.] The evil addressed by section 148.9(a) – bail skipping – is most likely to be avoided when an arrestee provides sufficient information to allow law enforcement to locate the person if he or she does not appear in court." (*In re Ivan J.* (2001) 88 Cal.App.4th 27, 30–31.) It is violated whenever any person falsely identifies himself in a way that would mislead the officer and evade proper identification, including by giving a false name or date of birth. (*Ibid*.)

To convict a person under this statute, "the prosecution need only establish the act of impersonation before a peace officer *upon a lawful detention or arrest*, for the purpose of evading the process of the court or proper identification." (*People v. Robertson* (1990) 223 Cal.App.3d 1277, 1281, italics added, reversed on other grounds in *People v. Rathert* (2000) 24 Cal.4th 200, 206–207.) The prosecution "need only establish general intent on the part of the defendant; or, in other words, that the defendant intended to do the act which forms the basis of the crime, whether or not he knew that the act was unlawful." (*Robertson*, *supra*, at p. 1282.)

The jury herein was properly instructed on the elements of violating section 148.9, subdivision (a). CALCRIM NO. 2617 stated:

> "To prove the defendant is guilty of this crime, the People must prove that: One, Officer Pope was a peace officer *lawfully performing or attempting to perform his duties as a peace officer*; *two, the defendant was lawfully detained or arrested*; three, the defendant falsely represented or identified himself as another person or a fictitious person; and four, when the defendant falsely represented or identified himself as another person or fictitious person he did so *with the intent to evade the process of the court or to evade the proper identification of himself by Officer Pope*." (Italics added.)

The jury was further instructed with CALCRIM No. 2670, that the People had the burden of proving beyond a reasonable doubt that Officer Pope was lawfully performing his duties as a peace officer.

> "A peace officer is not lawfully performing his or her duties *if he or she is unlawfully arresting or detaining someon*e.
>
> "A peace officer may legally arrest someone on the basis of an arrest warrant. Any other arrest is unlawful.
>
> "In deciding whether the arrest was lawful, consider the evidence of the officer's training and experience and all of the circumstances known by the officer when he or she arrested the person." (Italics added.)

E. Defendant's Offer to Stipulate

When the court considered defendant's offer to stipulate, it correctly found that the prosecution had the burden to prove defendant was subject to a lawful detention or arrest as elements of count II. The court followed the general rule, as explained in *Edelbacher* and subsequent cases, that the prosecution cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. (*Edelbacher*, *supra*, 47 Cal.3d at p. 1007.) The court asked the prosecutor if he would accept the stipulation. The prosecutor refused and insisted the officers should be able to explain why they were at defendant's apartment. The court accepted the prosecutor's reasoning and denied defendant's motion to stipulate.

In so ruling, however, the court apparently did not consider Thornton's caveat about the exception to that general rule. "*The exception – which we count on the trial courts to recognize and enforce – is the instance in which the probative value of the evidence is substantially outweighed by its prejudicial effect.* [Citation.]" (*Thornton*, *supra*, 85 Cal.App.4th at p. 49, italics added.)

Defendant argues that the court should have overruled the prosecutor's objections and accepted the stipulation because Officer Pope's testimony about the arrest warrant constituted inadmissible character evidence and was highly prejudicial. "California law has long precluded use of evidence of a person's character (a predisposition or propensity to engage in a particular type of behavior) as a basis for an inference that he or she acted in conformity with that character on a particular occasion …." (*People v. Walker* (2006) 139 Cal.App.4th 782, 795, fn. omitted; Evid. Code, § 1101, subd. (a).) However, the court may admit such evidence to prove a material fact at issue, such as identity, motive, or knowledge, subject to Evidence Code section 352. (Evid. Code, § 1101, subd. (b); *Ewoldt*, *supra*, Cal.4th at p. 400; *People v. Roldan* (2005) 35 Cal.4th 646, 705–707 (*Roldan*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Admissibility of this evidence depends on the materiality to the current offense

of the fact sought to be proved, the tendency of the uncharged act to prove the material fact, and whether there is any other rule requiring exclusion of the uncharged act. (*People v. Walker*, *supra*, 139 Cal.App.4th at p. 796; *Roldan*, *supra*, 35 Cal.4th at p. 705.)

In *Thornton*, the defendant did not move to stipulate to an element of the charged offense, and instead simply offered to forgo arguing or placing certain matters at issue. (*Thornton*, *supra*, 85 Cal.App.4th at pp. 47–48.) In this case, however, defendant offered to stipulate to certain elements of count II, in order to exclude any evidence that the police arrived at the apartment to serve an "arrest" warrant on defendant. Defendant's proposed stipulation would have satisfied the prosecution's burden of proving the first and second elements for count II, as set forth in CALCRIM No. 2671 – Officer Pope was lawfully performing or attempting to perform his duties, and defendant was lawfully detained or arrested. Such a stipulation would have also satisfied CALCRIM No. 2670, that Pope was lawfully performing his duties.

The prosecution also had the burden to prove the fourth element for count II: "when the defendant falsely represented or identified himself as another person or fictitious person he did so *with the intent to evade the process of the court or to evade the proper identification of himself by Officer Pope*." (Italics added.) When the court denied his request to stipulate, counsel asked if Officer Pope could simply testify that he had a "warrant" for defendant, instead of saying that he had an "arrest warrant." The court denied that request. However, defense counsel's proposal would have addressed the fourth element – that Pope had a warrant and defendant falsely identified himself to evade the process of the court or proper identification.

As for the third element for count II, giving a false identity, defendant never offered to plead guilty to count II and obviously intended to contest the credibility of Officer Pope's testimony that he falsely identified himself.

The court cannot force the prosecutor to accept a partial or inadequate stipulation that does not completely admit an element of the charged offense. (*People v. Sakarias*

(2000) 22 Cal.4th 596, 629.) In this case, however, the prosecutor did not object to defendant's offer to stipulate and claim it was incomplete. Defendant's proposed stipulation would have addressed two and possibly three of the four disputed elements of count II. Instead, the court accepted the prosecutor's insistence that the officers should be able to testify why they were at defendant's apartment.

Defendant's offer to stipulate would have excluded evidence about the outstanding arrest warrant, which was not otherwise relevant or admissible for any other purpose than to prove Officer Pope conducted a lawful detention or arrest for the misdemeanor charged in count II. The jury would have been instructed with CALRIM No. 222, that the People and the defense had stipulated to certain facts, it meant both parties accepted those facts as true, there was no dispute about those facts, and the jury also had to accept them as true.

In contrast to *Scheid*, *Garceau*, and the other cases discussed above, the evidence about defendant's arrest warrant was not relevant for any other purpose or disputed issue for which the prosecution had the burden of proof for this misdemeanor offense. The jury thus heard inadmissible character evidence that several officers arrived at the apartment to serve an arrest warrant on defendant; while the reason for the warrant was not disclosed, the jury was thus advised that defendant was wanted for some unspecified crime. This evidence was not relevant for any other purpose, and the prejudicial impact outweighed the probative value.

Accordingly, the court's conclusion that the prosecution could reject defendant's offer to stipulate to certain elements of count II was erroneous.

F. The Booking Photograph

In a related argument, defendant asserts the court similarly abused its discretion when it overruled his objection to Officer Pope's testimony that he recognized defendant because he had previously reviewed defendant's booking photograph. Defendant asked

to limit Pope's testimony so that he only said he looked at a "photograph" of defendant; the court replied that it "didn't really think it matters" and overruled the objection.

A booking photograph taken before the present charges were filed carries "the inevitable implication that [the defendant] suffered previous arrests and perhaps convictions …." (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 384, overruled on other grounds in *People v. Wright* (1987) 43 Cal.3d 399, 415, fn. 18.) A mug shot makes " 'the difference between the trial of a man presumptively innocent of any criminal wrongdoing and the trial of a known convict' [citation] and may well be equivalent to the introduction of direct evidence of prior criminal conduct. [Citation.] As such, a jury could well conclude that the [defendant] had a disposition to commit offenses …." (*People v. Vindiola*, *supra*, 96 Cal.App.3d at p. 384.)

Unless otherwise admissible under Evidence Code section 1101, subdivision (b), evidence of a prior arrest is generally inadmissible either as proof of guilt or as impeachment, and such evidence is highly prejudicial because of propensity inferences that may be drawn from it. (*People v. Medina* (1995) 11 Cal.4th 694, 769; *People v. Anderson* (1978) 20 Cal.3d 647, 650–651; *People v. Williams* (2009) 170 Cal.App.4th 587, 609–610.)

As applied to this case, it was obviously relevant for Officer Pope to testify that when he looked into the apartment and saw the man on the bed, he recognized defendant because he had looked at his photograph. However, Pope's testimony that he had looked at defendant's "prior booking photograph" was not relevant or probative for any purpose, and the court should have granted defendant's objection.

G. Prejudicial Error

The court's decisions to admit evidence and decline a defense stipulation are subject to review for abuse of discretion. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 723, fn. 5.) In addition, the erroneous admission of prior acts evidence is reviewed pursuant to

People v. Watson (1956) 46 Cal.2d 818; *People v. Jandres* (2014) 226 Cal.App.4th 340, 357.)

We find the court's erroneous evidentiary rulings are not prejudicial based on the entirety of the record. Defendant did not testify at trial, and defense counsel set forth his trial defense in closing argument: he conceded that defendant possessed the small amount of drugs found in his pocket when he was arrested. Given that concession, it would have been reasonable for the jury to conclude that the "booking" photograph and "arrest" warrant were related to his own drug use. Defense counsel also asserted that defendant did not possess or know about the larger amount of drugs found in the jacket pocket. Defendant did not testify to this account, and his credibility was not impeached with evidence of any prior arrests or convictions. Instead, this defense was based on witnesses who testified that they never saw heavy pedestrian traffic around his apartment; the cellphones belonged to a friend and he was loading music onto them; and a stranger arrived after he was arrested and wanted to look through the jacket, presumably for the larger amount of drugs.

While the court's evidentiary rulings were erroneous, the errors were not prejudicial because the inadmissible evidence did not impeach the credibility of the witnesses who set forth the defense theory of the case.

II. Officer Pope's Opinion Testimony

Defendant next contends the court improperly allowed Officer Pope to testify to the disputed factual question in this case, that defendant possessed the methamphetamine for purposes of sale. Defendant argues Pope's purported expert testimony about his "actual" state of mind violated his due process rights.

A. Background

Officer Pope testified he had been a police officer for over 10 years and was assigned to the violent crime impact team. In addition to academy training, he also had 220 additional hours of formal and specific training on the use, sales, packaging,

distribution, and transportation of narcotics, which addressed street level, and higher and upper level transactions. He had experience regarding methamphetamine through both specialized training and experience on the street. He had testified as an expert on narcotics 20 to 25 times and on possession and sale of methamphetamine eight to 10 times.

Officer Pope testified that in general, indicia of sales consisted of scales, packaging materials, pay/owe sheets, cellphones, cash, and the amount of methamphetamine. A simple possession case involves a very small amount of drugs, along with some type of ingestion tool.

The prosecutor asked Officer Pope if he had an opinion as to why defendant possessed the methamphetamine, based on his training and experience. Pope testified that in his opinion, defendant possessed the drugs for sale. Defense counsel objected and the court sustained the objection to the question as phrased.

The prosecutor showed Officer Pope the photograph of the materials found during the search, asked him to assume the items were possessed by one person, and asked if he had an opinion why that person would possess those items. Defense counsel objected. The court overruled the objection.

Officer Pope testified that in his opinion, the methamphetamine would have been possessed for purposes of sales. The prosecutor asked for the basis for that opinion. Defense counsel raised a continuing objection and the court directed Pope to continue.

Officer Pope testified to his opinion that the materials were possessed for the purpose of street-level sales, based on the large amount of methamphetamine, which was more than any personal user would consume in a reasonable length of time; the four cellphones, which are often used by drug dealers to keep drug contacts separate from personal contacts; the large amount of cash in small bills, consistent with sales of small amounts of drugs; the pay/owe sheet, to keep track of drug transactions; and the three people who happened to appear at the apartment without any explanation.

Outside the jury's presence, defense counsel placed his objections to Officer Pope's testimony on the record.

> "It is my understanding of the law is [Pope] is not allowed to render an opinion on the ultimate issue as to whether [defendant], if he possessed this methamphetamine, possessed it for the purpose of sale, and that is the way I think the questioning went, I think. Again, my understanding is the proper questioning, is this consistent with, are these items consistent with having been possessed for the purpose of sale. But I believe the way the questioning went was, do you – did he possess them for the purpose of sale, and that was – I felt was improper and that was the basis of my continuing objection."

The court stated it sustained defendant's objection to the prosecutor's initial question because he asked Officer Pope whether defendant possessed the drugs for sale, and it was improper to ask about defendant's state of mind. The court explained why it overruled defendant's subsequent objections.

> "The next set of questions had to do with showing the officer a photograph, and the question that was asked was, [a] person who possessed items like these, do you have an opinion as to the purpose for which those were possessed. The Court believes that to have been a proper question and the proper response from the officer because the question essentially was if somebody had this kind of stuff as opposed to directly what [defendant] was thinking at the time. I believe the code allows an expert to testify as to an ultimate issue. What he's not permitted to do is to testify as to the defendant's state of mind."

The jury was instructed with CALCRIM No. 332, about the consideration of expert testimony.

> "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training and education, the reasons the expert gave for any opinion and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may

disregard any opinion that you find unbelievable, unreasonable or unsupported by the evidence.

"An expert witness may be asked hypothetical questions. The hypothetical question asks the witness to assume facts are true – certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

B. Analysis

An expert may testify to an opinion related to "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact …." (Evid. Code, § 801, subd. (a).) An expert's opinion may "embrace[] the ultimate issue to be decided by the trier of fact." (*Id.,* § 805.)

In *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), the prosecutor asked the expert a hypothetical question which was identical to the evidence presented at trial, and whether the expert had an opinion if "this particular crime" was committed for the benefit of a particular gang. The expert responded in the affirmative, gave his opinion, and explained the basis for that opinion. (*Id.* at p. 1043.) The prosecutor presented the expert with additional hypothetical facts based on the evidence and asked whether the crime was gang motivated. The expert again said yes. (*Ibid.*) The defendant claimed that the hypothetical was objectionable because it closely tracked the facts of the case and was a "thinly-disguised" attempt to obtain an opinion on guilt or innocence. (*Id.* at pp. 1044, 1041.)

Vang rejected the claim and explained that a hypothetical not based on the evidence would be improper because such a question would be "irrelevant and of no help to the jury." (*Vang*, *supra*, 52 Cal.4th at p. 1046.) "Expert testimony *not* based on the evidence will not assist the trier of fact. Thus, '[a]lthough the field of permissible hypothetical questions is broad, a party cannot use this method of questioning a witness to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced.' [Citation.]" (*Ibid.*) "The questions were directed to

helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Ibid*., italics in original.) *Vang* acknowledged "there are dangers with hypothetical questions," but it is "not a legitimate objection that the questioner failed to disguise the fact the question was based on the evidence." (*Id*. at p. 1051.)

In this case, the court properly sustained defendant's initial objection to Officer Pope's testimony, when the prosecutor asked for his opinion about why *this defendant* possessed the methamphetamine and other items found during the search. The prosecutor then rephrased the question and posed the type of hypothetical approved by *Vang* – to assume that a person possessed the same amount of drugs, cash, cellphones, and pay/owe sheets as were found in this case, and offer an opinion as to why that person possessed those items.

While the hypothetical question, and the expert's answer, may have addressed the ultimate issue, *Vang* further explained that "expert testimony is permitted even if it embraces the ultimate issue to be decided. [Citation.] The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang*, *supra*, 52 Cal.4th at pp. 1049–1050.)

As in *Vang*, the court in this case properly overruled defendant's objections and "understood precisely the distinction between (1) not permitting the expert to opine that the particular defendant[] committed a crime for a [particular] purpose, and (2) permitting the expert to express his opinion in response to hypothetical questions." (*Vang*, *supra*, 52 Cal.4th at p. 1049.)

III. Defense Counsel's Closing Argument

Defendant next contends the court denied his due process right to present a defense when it sustained the prosecutor's objection to defense counsel's closing

argument that the officers seized and removed the jacket which contained the large amount of drugs; Rummerfield and Kennett packed another jacket after his arrest; and the stranger who asked for the jacket was looking for the first one.

The court sustained the prosecutor's objection to facts not in evidence because Officer Pope never testified that he seized the jacket that contained the drugs. Defendant contends counsel was simply trying to argue that he "may not have been the owner of the blue jacket" which contained the drugs, and if the jury "believed the jacket was owned by someone else, it would have created serious doubt" as to whether defendant had "authority" to sell someone else's drugs. Defendant further contends the court compounded the error when it allowed the prosecutor to argue the jacket which contained the methamphetamine was "the jacket [defendant] was proud of. As a result, the prosecution was allowed to argue the ownership issue, but not the defense."

As we will explain, however, the court's ruling did not prevent defendant from presenting a defense.

A. Trial Evidence

As set forth in the factual statement, Officer Pope testified defendant was wearing a black jacket and blue jeans when he was arrested. During the search of defendant's apartment, Pope found a jacket hanging on a hook near the front door. He searched the jacket that was on the hook, and found a container with 4.3 grams of methamphetamine inside it. Pope testified he seized the drugs, cellphones, the container, and cash. He did not testify that he seized the jacket that had the container with the methamphetamine. The prosecution introduced a photograph of the evidence that was seized; a jacket was not depicted in the picture.

Rummerfield and Kennett testified they packed defendant's belongings after he was arrested. Rummerfield testified she found defendant's blue jacket hanging in the closet, and she packed it in one of the boxes. Rummerfield testified a man appeared the next day and asked for "a blue jacket. We showed him [defendant's] jacket and it wasn't

the same jacket. He was mad." Rummerfield testified defendant had been "*very proud of that jacket*" and she knew it was not the stranger's jacket. (Italics added.)

B. The Prosecutor's Closing Argument

In his closing argument, the prosecutor asserted defendant possessed the large amount of methamphetamine found in the jacket because the jacket and drugs were found in defendant's apartment, he had the key to the apartment, and the jacket looked like it would fit defendant. The prosecutor cited to the testimony of Rummerfield and Kennett, and argued: "[T]here was the larger quantity found in defendant's jacket, his blue jacket that he's proud of it. It was in his apartment…" "The question is: How do we know it was the defendant's jacket? Well, it looked like it would fit the defendant and defense witnesses came in and kind of clarified it for us, stated it's his jacket, he's proud of that jacket, he wouldn't give that jacket to anyone else. That's how we know…."

Defense counsel did not object to this argument.

C. Defense Counsel's Closing Argument

Defense counsel conceded defendant possessed the small amount of methamphetamine found in his pants pocket, and that it was for his own personal use. Defense counsel disputed the prosecution's claim that defendant was selling drugs, and argued there was no evidence defendant possessed the large amount of methamphetamine found in "the pocket of the blue jacket."

In making this argument, defense counsel cited to the testimony from Kennett and Rummerfield, about packing defendant's possessions and the stranger who appeared at their door. Defense counsel argued:

> "The large amount of methamphetamine that is found in the jacket pocket, I didn't hear where [defendant's] possession of that jacket is proved by the defense witnesses. What– I believe it was Patricia Kennett and Ms. Rummerfield told you was [defendant] does have a blue jacket that he is proud of and that was in his closet at the time. And when [defendant] was taken away by the police, the blue jacket that is in [defendant's] closet is collected by Ms. Rummerfield and by Ms. Kennett – all his belonging[s] –

there's nothing particular about that blue jacket, all of his belongings are collected by his two friends because [defendant's] possessions are not necessarily safe in that apartment while he's not there. *And what were you told [sic] was some other individual came looking for a blue jacket and [defendant's] blue jacket is not the blue jacket that he was looking for. The blue jacket that the police took into custody that had this larger amount of methamphetamine in it is the jacket belonging to that other individual, it is not belonging to [defendant] and [defendant]*---

"[THE PROSECUTOR]: Objection, facts not in evidence.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: In any event, I would urge you to – I would urge you to reread the testimony – or have read to you the testimony of the defense witnesses. I believe it's Patricia Kennett and Ms. Rummerfield." (Italics added.)

There were no further objections.

D. Analysis

Defendant argues the court erroneously upheld the prosecutor's objection to counsel's closing argument, which prevented him from presenting his defense. However, "[i]t is axiomatic" that a defense attorney "may not state or assume facts in argument that are not in evidence." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.)

As set forth above, defense counsel tried to argue there were two jackets in defendant's apartment: the first jacket was searched by Officer Pope, and he found the silver canister with the large amount of methamphetamine. Counsel's argument assumed that Pope seized that jacket and booked it into evidence, along with the cash, methamphetamine, cellphones, and pay/owe sheet. Counsel thus asserted that when defendant's friends packed his personal belongings, they folded a second jacket which had been left behind. Counsel further assumed the stranger looked at the jacket which they had packed, and became mad and left. Counsel thus concluded that the stranger was looking for the jacket which Pope searched, contained the large amount of methamphetamine, and had presumably been booked into evidence, and he became mad when he was presented with the jacket that was left behind.

The problem with defense counsel's argument was that Officer Pope never testified that he seized the jacket and booked it into evidence. Pope testified he seized the drugs, the silver canister, the cash, the cellphones, and the pay/owe sheet, and a photograph of this evidence was introduced. There was no evidence that he also seized the jacket which contained the drugs.

Thus, defense counsel's argument was based on speculation that there were two jackets, and the jacket with the drugs was seized by the police. This assertion was not supported by the evidence because Officer Pope never testified that he seized the jacket which contained the methamphetamine.

The court properly sustained the prosecutor's objection and, in doing so, the court did not violate defendant's due process right to present a defense. However, the court's ruling did not prevent the jury from considering the testimony from Kennett and Rummerfield, and whether the "stranger" knew about the larger amount of drugs in the jacket, in support of the defense theory that defendant did not possession that amount for purposes of sale.

IV. The Prosecutor's Rebuttal Argument

Finally, defendant argues the prosecutor committed prejudicial misconduct during his rebuttal argument by asserting the defense witnesses used methamphetamine, in the absence of any supporting evidence.

A. The Court's Ruling on Impeaching the Defense Witnesses

Just before the defense witnesses testified, the prosecutor stated they all had prior convictions and moved to impeach them accordingly. Defendant objected to the introduction of the witnesses' prior convictions. The court considered each witness separately.

The prosecutor said Angel Smith, the apartment manager, had a prior conviction for misdemeanor presentation of a false claim in 2007. The court excluded Smith's prior conviction because it was old and a misdemeanor.

Keith Thompson, the assistant manager, had prior convictions for grand theft in 1986, and possession of a dangerous weapon in 1998. The court excluded both convictions because they were too old. The prosecutor said Pamela Rummerfield, defendant's neighbor who packed his clothes, had several misdemeanors. The court excluded all of her misdemeanor convictions.

Patricia Kennett, defendant's other neighbor, had prior convictions for attempted grand theft in 1991; misdemeanor petty theft in 1991; welfare fraud in 1996; possession of stolen property, a car that was treated as a misdemeanor in 2005; and giving a false name in 2008. The court said the prosecutor could impeach Kennett with the 2005 and 2008 convictions, but excluded the other cases since they were too old. When Kennett testified, however, the prosecutor did not impeach her.

Thus, the prosecution did not introduce any evidence to the jury that the defense witnesses had prior convictions or they were involved with drugs. In her defense testimony, however, Temmeca Dykes testified that she gave the four cellphones to defendant so he could load his music list on them; and that she obtained the cellphones from homeless people in the neighborhood, in exchange for food, clothes, or a "joint."

The prosecution introduced a photograph of the pay/owe sheet found on the refrigerator in defendant's apartment. There were several names written on the sheet, including "Pam." The People did not introduce any evidence to connect Pamela Rummerfield to the name "Pam" on the pay/owe sheet.

B. The Prosecutor's Rebuttal Argument

In his rebuttal argument, the prosecutor asked the jury to use common sense to view the entirety of the evidence, and addressed the credibility of the defense witnesses.

> "[THE PROSECUTOR]: With respect to the defense witnesses, I don't know what you thought of them, whether they made you chuckle a little bit, whether you believe them, whether you disbelieve them, *but they kind of showed you the environment that [defendant's] in, kind of showed you what methamphetamine does.*

"[DEFENSE COUNSEL]: Objection.

"THE COURT: Sustained.

"[DEFENSE COUNSEL]: Misstates evidence.

"THE COURT: Sustained.

"[THE PROSECUTOR]: We have ample evidence. When you look at it, when you use your common sense and you use your experience to show not only that the defendant possessed that methamphetamine, that he had it in his apartment, but he possessed it to sell it…." (Italics added.)

Defense counsel did not request an admonition. There were no further objections.

C. Analysis

A prosecutor commits misconduct when he or she refers to facts not in evidence during closing argument. (*People v. Hill* (1998) 17 Cal.4th 800, 827–828; *People v. Osband* (1996) 13 Cal.4th 622, 698.) While the prosecutor moved to impeach the defense witnesses with their prior convictions, the court denied the motion and the defense witnesses were not impeached. However, the jury heard admissible evidence that one of the defense witnesses was involved with drugs. Temmeca Dykes testified that she gave the four cellphones to defendant so he could load his music list on them; and that she obtained the cellphones from homeless people in the neighborhood in exchange for food, clothes, or an unspecified type of "joint."

In any event, defense counsel made a timely objection to the prosecutor's closing argument which the court sustained, but counsel failed to request an appropriate admonition. "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a

consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820–821.)

None of these circumstances was present in this case. There is nothing in the record to indicate the court would not have heard or considered a request for an admonition in response to the prosecutor's argument. Even assuming he did not forfeit his claim by failing to request an admonition, defendant "fails to demonstrate the inadequacy of the remedy he did receive when his various objections were sustained." (*People v. Tully* (2012) 54 Cal.4th 952, 1015.)

DISPOSITION

The judgment is affirmed.

_____
POOCHIGIAN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
PEÑA, J.